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No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CALIFORNIA BROADCASTERS ASSOCIATION, GEORGIA BROADCASTERS ASSOCIATION, IOWA BROADCASTERS ASSOCIATION, KANSAS BROADCASTERS ASSOCIATION, MAINE BROADCASTERS ASSOCIATION, MINNESOTA BROADCASTERS ASSOCIATION, MISSOURI BROADCASTERS ASSOCIATION, MONTANA BROADCASTERS ASSOCIATION, NEBRASKA BROADCASTERS ASSOCIATION, NEW JERSEY BROADCASTERS ASSOCIATION, AND OKLAHOMA BROADCASTERS ASSOCIATIONAS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the California Broadcasters Association, Georgia Broadcasters Association, Iowa Broadcasters Association, Kansas Broadcasters Association, Maine Broadcasters Association, Minnesota Broadcasters Association, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, New Jersey Broadcasters Association, and Oklahoma Broadcasters Association (collectively, the "Named State Associations"). Each of the Named State Associations is, in turn, a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations licensed to communities within their respective states.

Each of the Named State Associations has the responsibility to represent its members in matters relating to the broadcasting industry and government regulation. And each has a keen interest in ensuring that the FCC's indecency policy does not impose upon its members the threat of crippling liability and consequent self-censorship.

SUMMARY OF ARGUMENT

On pain of fines of $325,000 per incident, radio and television stations across the Nation are now forced by the FCC's fleeting expletives policy to engage in expensive monitoring and policing of live broadcasts lest a stray Anglo-Saxon word slip out, no matter how isolated and no matter

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

how lacking in sexual or excretory meaning in context. For many broadcasters, the chilling effect is profound and discourages live programming altogether, with attendant loss to valuable and vibrant programming that has long been part of American culture.

Nothing in *FCC v. Pacifica* authorizes or requires this result. *Pacifica* allowed the FCC to sanction indecent language only where it was so repetitive and sexual and excretory in meaning as to amount to "verbal shock treatment." *Pacifica* expressly declined to assess the First Amendment treatment appropriate to a mere "occasional expletive."

Moreover, nothing in *Pacifica* authorized the FCC to engage in vague, selective or arbitrary regulation of indecent language. Yet the current policy allows unpredictable exceptions for "artistic" and "news" purposes that force broadcasters to guess at what programming is and is not actionable, and therefore necessarily to steer far wide of the forbidden zone.

The inexorable result is widespread broadcaster self-censorship that deprives the public of valuable and traditionally accessible live news, sports, talk and entertainment programming. Such precautionary measures as tape delays are expensive, cumbersome, and hardly foolproof, as the facts underlying this case illustrate. And the cost and risk associated with such measures can be prohibitive, depending on station and market size.

The pall thus cast on live broadcasting is needless, for filtering technologies have increasingly enabled parental self-help with respect to television as well as cable and the Internet. Such alternatives are far preferable to the FCC's restrictive policies, and reinforce the conclusion that there is no need to expand the First Amendment limits set forth in *Pacifica*.

For all these reasons, the FCC's indecency policy, at a minimum, raises serious First Amendment concerns. Under the canon of constitutional avoidance, FCC authority to impose the new policy should be read narrowly and the decision below should be affirmed.

ARGUMENT

In 2004, the FCC reversed a longstanding policy that fleeting expletives would not be actionably indecent under the Commission's indecency standard. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) ("*Golden Globes*"). While this appeal arises under the Administrative Procedure Act, the FCC's reversal of its longstanding policy against sanctioning "fleeting expletives" also raises serious First Amendment questions.

This Court has recognized repeatedly that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Only the "affirmative intention of the Congress clearly expressed" can justify any broader construction. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (construing NLRA as denying jurisdiction to NLRB to adjudicate a labor dispute at church-operated schools in order to avoid serious First Amendment questions).

To avoid serious constitutional questions here about the validity of the FCC's indecency regime, this Court should construe Congress's grant of power to the FCC to regulate indecent speech as precluding its ability to sanction fleeting expletives absent clear statement from Congress. No such statement exists. To the contrary, Congress's grant of power to the FCC under 18 U.S.C. § 1464 to sanction indecent lan-

guage is governed by the overarching requirement in the Communications Act that the FCC avoid interfering with licensees' editorial decisions. 47 U.S.C. § 326 ("Nothing in [the Act] shall be understood or construed to give the Commission the power of censorship . . . , and no regulation or condition shall be promulgated or fixed . . . , which shall interfere with the right of free speech . . . ."). The Court thus should not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *DeBartolo*, 485 U.S. at 575. And were this Court to reach the constitutional question directly, it should find that the First Amendment protects the speech at issue here.

I. SANCTIONING FLEETING EXPLETIVES EXCEEDS THE FIRST AMENDMENT LIMITS SET FORTH IN *PACIFICA* FOR THE REGULATION OF BROADCAST INDECENCY

This Court set forth the governing framework for First Amendment limits on the regulation of broadcast indecency in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which held that the First Amendment permits the FCC to regulate expletives aired on broadcast media when tantamount to "verbal shock treatment." *Id.* at 757 (Powell, J., concurring). *Pacifica* involved a mid-afternoon radio broadcast of comedian George Carlin's twelve-minute "Filthy Words" monologue – a satirical rant deliberately filled with repeated sexual and excretory expletives. *Id.* at 729 and 751-55 (appendix containing verbatim transcript). Noting that broadcast media were "uniquely pervasive" and "uniquely accessible to children," *id.* at 748, 749 (majority opinion), the Court observed that less restrictive alternatives like the warning that preceded Carlin's monologue could not "completely protect the listener or viewer from unexpected program content." *Id.* at 748. Based on these features, the Court held that the FCC

did not violate a radio station's free speech rights in sanctioning the airing of Carlin's monologue. *See id.* at 749-50.

Taking care to "emphasize the narrowness of [its] holding," however, and reiterating that "context is all-important," *Pacifica* did not address whether the FCC could sanction an "occasional expletive." *Id.* at 750 (majority opinion); *id.* at 760-61 (Powell, J., concurring) (noting that the Court's holding did not "speak to cases involving the isolated use of a potentially offensive word"). It suggested that, absent a calculated design to shock, its narrow holding might not apply. For example, it exempted sexual or excretory expletives in "an Elizabethan comedy." *Id.* at 750 (majority opinion).

The narrowness of *Pacifica*'s holding is unsurprising given that the First Amendment protects the public use of expletives or sexually suggestive speech in other contexts. *See Cohen v. California*, 403 U.S. 15, 26 (1971); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000). And the FCC long recognized the narrowness of *Pacifica*'s holding, limiting enforcement for over twenty-five years to "only repetitive use of the specific words [in the Carlin monologue]." *New Indecency Enforcement Standards, Public Notice*, 2 F.C.C.R. 2726, 2726 (1987). The FCC disavowed any notion that *Pacifica* covered fleeting expletives: "If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987).

Only in 2004 did the FCC depart from its settled understanding of *Pacifica* by announcing a shift to censoring fleeting expletives. But, for the following reasons, the concerns expressed in *Pacifica* do not apply in this context.

A. Unscripted Fleeting Expletives Are Not Deliberate And Repetitive

In *Pacifica*, this Court allowed the FCC to sanction a radio broadcast of a recorded monologue that bombarded listeners with sexual or excretory expletives only on the basis that it amounted to "verbal shock treatment." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Instead of the "occasional expletive" at issue here, *id.* at 750, the Court focused on expletives "repeat[ed] . . . over and over again." *Id.* at 729 (majority opinion). The Carlin monologue lasted twelve minutes and used the word "fuck" or one of its variants 32 times and the word "shit" or one of its variants 70 times, in addition to countless other expletives. *See Pacifica*, 438 U.S. at 751-55 (appendix).

Unscripted fleeting expletives, in contrast, are neither deliberate nor repetitive. Regulating them thus necessarily would impose far greater burdens on broadcasters in practice. A radio or television station can guard against a preplanned string of expletives, or channel it to a time zone when children will not be exposed. *See id.* at 750 (emphasizing the FCC's "nuisance rationale" for channeling indecent speech to different hours); *id.* at 757 (Powell, J. concurring) (stating that the FCC's channeling rationale provided strong support for its decision). No such precautions are readily available, by contrast, for spontaneous indecent language. By nature, an unscripted expletive cannot be time-channeled, because the station has no forewarning. Nor are simple precautions adequate. Even a five-second tape delay was not enough, for example, to enable Fox to bleep out Cher's expletive or one of Nicole Richie's expletives during the Billboard Music Awards. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, 13311 ¶ 32, 13312-13 ¶ 34 (2006) (*"Remand Order"*).

Thus, while *Pacifica* upheld the time-channeling of relentlessly repeated indecent words in a pre-recorded broadcast, fining broadcasters for inadvertent or spontaneous expletives uttered in live broadcasts is likely to deter the broadcast of live events in the first place. Nothing in *Pacifica* suggested that sanctions were permissible where channeling was impossible.

B. Fleeting Expletives Are Not Necessarily Sexual Or Excretory

Unlike Carlin's monologue, the fleeting expletives in this case do not describe sexual or excretory activities and organs. Cher and Nicole Richie, for example, spontaneously uttered words on live television "for emphasis or as an intensifier." *Id.* at 13304 ¶ 16. Including a fleeting expletive on live television may simply capture the emotion of a live event or speaker. *See Cohen v. California*, 403 U.S. at 26 (noting, in protecting a jacket saying "Fuck the Draft," that the "emotive function" of speech may be more important than the cognitive). The FCC itself implicitly recognized as much when it decided that a "Survivor: Vanuatu" contestant's use of the word "bullshitter" was non-actionable because the contestant stated the word during a live television interview. *Remand Order*, 21 F.C.C.R. at 13328 ¶ 73. Imperiling all expletives on live television, regardless of their sexual or excretory connotations, goes beyond *Pacifica*.

II. THE FCC'S VAGUE AND STANDARDLESS INDECENCY REGIME CAUSES NEEDLESS SELF-CENSORSHIP BY BROADCASTERS

The FCC's current indecency regime presumes that all variants of the words "fuck" and "shit" are indecent, but grants exceptions—for example, where use of expletives is "integral" to a work or part of a "*bona fide* news interview." Such *ad hoc* and subjective determination by government of the relative value of different types of speech raises serious

First Amendment questions not reached or addressed in *Pacifica*. Such selective enforcement renders the policy too vague for broadcasters to have fair notice of what speech is and is not permitted. And such exercise of standardless discretion risks impermissible viewpoint discrimination.

A. The FCC Indecency Policy Is Impermissibly Vague

The First Amendment "demands a greater degree of specificity than in other contexts," lest speech be deterred by the speaker's uncertainty about what is permitted and reluctance to come too close to the line. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Although the FCC's presumption that the words "fuck" and "shit" are indecent in all their variants does provide some guidance, not even the FCC claims that they may be sanctioned in every circumstance. Broadcasters should not be forced to guess as to when use of such words will be actionable and when it will not. Nor should their speech be chilled in an attempt to comply with this scheme.

The FCC holds that indecent broadcasts are actionable where the material falls within the "subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities," and the broadcast must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original). The FCC has clarified "patently offensive" as depending upon: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphasis omitted).

These factors, however, provide little objective guidance for broadcasters. All three depend upon the subjective reactions, opinions, and beliefs of Commissioners or their staff watching or listening to a past broadcast with ample time to reflect, unlike broadcasters who must make split-second judgments in real time. The second factor, involving repetition, is hardly dispositive or these cases about fleeting expletives never would have arisen. And unchanged since 2001, several years before the FCC's abrupt change in policy, these factors in fact give local broadcasters, commercial or noncommercial, virtually no true guidance on what constitutes indecent programming.

Faced with such opaque definitions, broadcasters must assume that all expletives are actionable or else risk the possibility of huge sanctions, requiring them to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1974) (internal citations and quotations omitted). As this Court has stated, "Free speech may not be so inhibited." *Id.*

The FCC's policy has resulted in just such inhibition. For instance, 66 ABC affiliates in cities both large and small felt so threatened by the possibility of FCC sanctions that they refrained from airing the film *Saving Private Ryan* on Veteran's Day in 2004. *See* Frank Rich, *Bono's New Casualty: 'Private Ryan'*, N.Y. Times, Nov. 21, 2004, at AR1. Similarly, on September 11, 2006—the fifth anniversary of the World Trade Center attacks—CBS stations covering approximately 10% of the nation refused to air the Peabody Award-winning documentary *9/11* during prime time out of fear of FCC sanctions. *See* Lisa de Moraes, *Sunday Night Football Bulls Past 9/11 Programs*, Wash. Post, Sept. 12, 2006, at C7.

Such inhibition and self-censorship is not confined to network programming; it affects small broadcasters too, often

in more crippling ways. For example, until February 11, 2005, the Niagara Frontier Radio Reading Service ("NFRRS") broadcast readings from newspapers, books, magazines, and other printed material to blind and visually impaired persons twenty-four hours a day on the Secondary Audio Channel of local ABC-TV affiliate WKBW-TV/Channel 7 in Buffalo, New York. But when an expletive in a reading of Tom Wolfe's best-selling novel *I Am Charlotte Simmons* caught a listener's attention and prompted a complaint, the station, fearing "potential heavy fines," announced that NFRRS's fourteen years of broadcasts on the station were "done." After two weeks, the station came around, but allowed NFRRS to resume broadcasting only during drastically reduced hours, thereby providing the station's visually impaired audience with far less service than during its once "24-7" readings. *See* Anthony Violanti, *One Complaint Limits Reading Service for the Blind*, Buffalo News, Mar. 2, 2005, at C1.[2]

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[2] Comments presented to the FCC demonstrate that there were numerous other examples of self-censorship as a result of the FCC's vague standard, even by non-commercial broadcasters. *See, e.g.*, Comments of Minnesota Public Radio, DA 06-1739 (Sept. 21, 2006), *available at* http://www.fcc.gov/DA06-1739/mpr.pdf, Declaration of Thomas J. Kilgin, at 9-10 (Southern California Public Radio declined to broadcast an interview with a student whose friends were injured in a shooting rampage at his school because the student used expletives); Declaration of Stanley ("Bud") Wilkinson, Jr. at 5 (the syndicated radio program Broadway's Biggest Hits has deleted or censored songs such as "Master of the House" from "Les Miserables," "The King of Broadway" from "The Producers," and "American Dream" from "Miss Saigon"); Declaration of Thomas J. Kilgin, at 5-6 (after broadcasting a highly regarded Los Angeles theater's production of a Tony Award-winning play that contained expletives, Southern California Public Radio cancelled its broadcast of live performances from the theater and later relegated such broadcasts to 10 p.m. on Saturdays, attracting a much smaller audience); Declaration of Dennis Fisher, at 2-3 (WNEP-TV16, a Pennsylvania television station, no longer provides any live coverage of events where crowds are present, except in the event of a "civil emergenc[y]").

B. By Granting Arbitrary Exceptions To Its Indecency Policy, The FCC Exercises Impermissibly Standardless Discretion.

As might be expected of such a vague regulation, the FCC's indecency policy has allowed for "'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. at 573 (internal citations omitted). The FCC's policy presumes that, because "[t]he 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language," any use of that word has sexual connotations and thus falls within the scope of the indecency definition, *Golden Globes*, 19 F.C.C.R. 4975, 4979 ¶ 8, and is patently offensive under contemporary community standards. *Id.* at ¶ 9. In 2006, in the FCC decisions at issue in this case, the Commission reaffirmed its *Golden Globes* decision regarding the presumptive indecency of the "F-Word." *Remand Order*, 21 F.C.C.R at 13304-05 ¶¶ 16-17. Furthermore, the Commission held that entertainer Nicole Richie's use of the S-Word at a broadcast of the 2003 Billboard Music Awards was actionably indecent under the Commission's regime. *Id.* at ¶ 16.

In at least two instances, however, the Commission has granted exceptions to these presumptive prohibitions. In 2005, the Commission held that repeated and deliberate use of numerous expletives was not indecent in ABC's broadcast of the film "Saving Private Ryan." *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512-13 ¶ 14 (2005). In that decision, the Commission found that deleting the pervasive expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 4513 ¶ 14.

Similarly, in the *Remand Order* at issue in this case, the Commission found that an interview on CBS's "The Early Show" with a "Survivor: Vanuatu" contestant, in which the interviewee referred to a fellow contestant as a "bullshitter," *Remand Order*, 21 F.C.C.R. at 13326 ¶ 67, was not actionably indecent since the word was used in the context of a "*bona fide* news interview." *Id.* at 13328 ¶ 72-73. The Commission stated that, although "there is no outright news exemption from our indecency rules," it was imperative that it "proceed with the utmost restraint when it comes to news programming" and found it "appropriate . . . to defer to CBS's plausible characterization of its own programming" as a news interview. *Id.* at 13327-28 ¶ 71-72.

By contrast, the FCC declined to extend its artistic exception to "Godfathers and Sons," a Martin Scorsese documentary on the history of the blues in which several jazz musicians who were interviewed used expletives. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2686 ¶ 82 (2006) ("*Omnibus Order*"). In issuing a $15,000 Notice of Apparent Liability ("NAL") against a public television station for airing the documentary, the FCC stated, "While we recognize here that the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

Similarly, the FCC issued a $3.35 million NAL for broadcast of an episode of *Without a Trace* where the FCC determined that non-explicit dramatization highlighting the problems facing unsupervised teenagers, including sexual activities, "goes well beyond what the story line could reasonably be said to require." *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* 21 F.C.C.R. 2732, 2736 ¶ 15 (2006).

The FCC also issued a $27,500 NAL for broadcast of the film, *The Pursuit of D.B. Cooper*. It stated that it "[did] not believe that [the language used] was essential to the nature of an artistic or educational work or that editing the language would have materially altered the nature of the program." *Omnibus Order*, 21 F.C.C.R. at 2689 ¶ 99.

Thus, since its *Golden Globes* Order, the FCC has enforced its indecency regime in an arbitrary and discriminatory manner, allowing exceptions to the regime when it deems certain programming to merit use of expletives for the sake of artistic integrity or a "*bona fide* news interview," and enforcing it against other programming using identical language. Such inconsistent results subject different speech to different burdens depending on its content, a cardinal violation of the First Amendment in other contexts.

Government has no business drawing distinctions among uses of identical language based upon a subjective view of which such uses are more artistic, topical or edifying than others. It "may not select which issues are worth discussing or debating," *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Even *Pacifica* disavowed any government license to determine "which speech protected by the First Amendment is most valuable and hence deserving of the most protection, and which speech is less valuable and hence deserving of less protection." *Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (internal quotations omitted).

In contravention of these principles, the FCC's approach amounts to a standardless licensing scheme for fleeting expletives. This Court has consistently held unconstitutional any licensing scheme that places unfettered discretion in the hands of the licensor. *See, e.g.*, *Lovell v. Griffin*, 303 U.S. 444 (1938); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (plurality opinion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. CIO*, 307 U.S. 496 (1939). Standardless licensing schemes present "two major First

Amendment risks . . . : self censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting reviewing, and correcting content-based censorship." *Lakewood*, 486 U.S. at 759 (plurality opinion). Both concerns are amply borne out here.

For these reasons, the FCC's indecency policy, as enforced in any context other than broadcasting, would readily be held vague and standardless in violation of the First Amendment. Even in the broadcasting context, this policy gives rise to serious First Amendment concerns warranting limiting statutory and regulatory construction.

III. HEAVY FINES IMPOSED BY THE FCC FOR THE USE OF FLEETING EXPLETIVES DISCOURAGE LIVE BROADCASTING

For the reasons noted above in Parts I and II, the FCC's fleeting expletives policy goes much further than *Pacfica* authorized by sanctioning unscripted and non-repetitive expletives, and is vague and rife with standardless exceptions that encourage broadcaster self-censorship, depriving the public of valuable programming. For both reasons, it discourages live radio and television broadcasts that have long been an integral part of the Nation's culture and dialogue. These chilling effects are exacerbated by the broad discretion the FCC enjoys to impose crippling fines.

The live programming threatened by the FCC's indecency policy is significant. As of 2008, more than 112 million, or around 98%, of U.S. households had a television set, and over 70% watch television on any given evening.[3] Sports and news events that are carried live give viewers a real-time connection to events as they unfold. On February

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[3] *See* Nielsen Media Research, Universe Estimates, Jan. 1, 2008 *available at* http://www.nielsenmedia.com/nc/nmr_static/docs/2008_FINAL_National_UEs_Mkt_Brks%20_Pers.xls; Bill Fine, Op-Ed., *Tuning in to a TV revolution*, Boston Globe, Feb. 12, 2008, at A14.

3, 2008, 97.5 million Americans watched Super Bowl XLII, the second highest broadcast audience in U.S. history. *See* Lisa de Moraes, *Super Bowl's Biggest Score: 97.5 Million Viewers*, Wash. Post, Feb. 5, 2008, at C1. Live television broadcasts also provide vital reporting of breaking news events, from the September 11, 2001 terrorist attacks to the devastation of Hurricane Katrina in August 2005.

A. The FCC's Broad Discretion To Impose Crippling Indecency Fines Has Caused Self-Censorship By Live Broadcasters

The FCC has the ability to impose a number of sanctions for failure to comply with its decency regulations. *See* 18 U.S.C. § 1464 (2008) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). These sanctions can include heavy fines or even revocation of a broadcast station's license.[4] When a live broadcast is carried on many broadcast affiliates, a single fleeting expletive may be considered a separate violation by each affiliate, resulting in multiplication of the fines imposed on the broadcaster. If affiliates are not indemnified by broadcast networks, even a single violation may prove devastating.[5]

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[4] Congress recently enacted a tenfold increase in the maximum fine for indecent broadcasting. *See* 47 U.S.C.A. § 503(b)(2)(C)(ii) (2007) (raising the fine for broadcasting "obscene, indecent, or profane language" from $32,500 to up to "$325,000 for each violation or each day of a continuing violation"). *See also* 47 U.S.C. § 312(a)(6) (2007) ("The Commission may revoke any station license or construction permit for violation of section . . . 1464 of Title 18.").

[5] In addition to the threat of sanctions, under the FCC's current regime broadcasters and performers must concern themselves with the threat of an FCC investigation. Even when sanctions are not imposed, the cost of complying with an investigation may itself prove daunting. Moreover, this burden potentially extends beyond the broadcaster itself to

Faced with the threat of such expensive fines, radio and television programmers have shied away from certain programming in the wake of the FCC's change in policy. In September of 2006, on the fifth anniversary of the September 11, 2001 attacks, for example, CBS planned to air the documentary *9/11*, which included clips of the coverage of the events of that day. Because some of that coverage included audio of firefighters using expletives, and in the face of calls from the American Family Association urging that CBS forego or delay the broadcast, affiliates covering approximately ten percent of the United States decided not to broadcast *9/11* or to show it late at night. These affiliates cited concerns that they would otherwise be subject to FCC fines for broadcast indecency. *See* Lisa de Moraes, *Sunday Night Football Bulls Past 9/11 Programs*, Wash. Post, Sept. 12, 2006, at C7.

Likewise, radio broadcasts have been chilled by the FCC's indecency regulations. Some radio stations have stopped airing live performances and have abandoned live call-in formats for fear of FCC fines. *See* Mark Brown, *Broadcast words, actions stir efforts to clean up 'dirty' airwaves*, Rocky Mountain News, March 27, 2004, at 1D ("Virtually everything you hear on Denver airwaves now is either prerecorded or tape-delayed."); Paul Davidson, *Risque Business to Get 10 Times Riskier; Fine for TV, Radio Indecency to Rise to $325,000*, USA TODAY, June 8, 2006, at 1B (noting that Clear Channel radio stations cancelled Howard Stern's program because of the "government's indecency crusade"). In 2004, the Los Angeles National Public Radio affiliate KCRW even went so far as to fire Sandra Loh, whose monologues had been a "fixture on KCRW for six years," for uttering a single expletive. Greg Braxton, *KCRW fires Loh over obscenity*, L.A. TIMES, Mar. 4, 2004, at B1.

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any performers whom the FCC may wish to question or depose in relation to policies or events at issue.

B. Live Broadcasts Cannot Be Adequately Preserved By Tape Delays

No broadcaster can foresee every word that will be uttered in the live audio of a sporting event, a breaking news story, an awards show, or other such live broadcast events. Nor can any broadcaster predict what words might appear in live video on a sign, t-shirt, or other article of clothing in a live crowd shot, in-the-street or on-the-field interview. Thus, the only surefire way to remain on the safe side of the FCC's fleeting expletives policy is to refrain from live programming at all. The second-best is to employ a tape delay of all live broadcasts, but this device is costly and by no means foolproof.

To provide tape delays of live television, expensive and sophisticated recording and editing equipment is required to enable quick review and effective editing of any unexpected expletives. Because the tape delay equipment itself cannot recognize expletives, at least one person must operate the equipment and carefully monitor all live broadcasts in real time. Both the equipment and the manpower required to effectively employ a tape delay increase considerably the costs of providing a live broadcast.

Even if a tape delay is employed, there is no guarantee that human error will not occur, leaving the broadcaster exposed to sanctions despite good faith efforts to comply with FCC regulations. This was the case in two of the live broadcasts at issue here. At the 2002 Billboard Music Awards, Fox *did* employ a 5-second tape delay—but the monitor failed to catch Cher's fleeting expletive. *See Remand Order*, 21 F.C.C.R. at 13312-13 ¶ 34. At the 2003 Billboard Music Awards, Fox *again* employed a 5-second delay. The monitor effectively blocked Nicole Richie's first expletive, but could not block the next two because the three came in such quick succession. *See id.* at 13311 ¶ 32; Roger Parloff, *Bleep Deprivation*, Fortune, March 19, 2007, at 53. Thus, even when

broadcasters spend the money and effort to block fleeting expletives, their efforts are not always successful. Yet the FCC claims authority to impose sanctions notwithstanding broadcasters' best efforts. *See* 18 U.S.C. § 1464 (no provision to exempt broadcaster acting in good faith to comply).

In addition to the failures of tape delays to catch and block all fleeting expletives, tape delays are practically difficult to implement in certain live broadcast situations. For example, in many news reports, a reporter in the field is listening and responding to the live broadcast—not to a separate feed directly from the studio. Introducing even a brief tape delay would introduce long and distracting delays between the questions from the studio and the responses of the reporters in the field. The problem is even more intractable with respect to catching any stray visual expletive in crowd shots.

Tape delays are also practically unworkable in situations where a broadcaster is providing live coverage from multiple locations in a single broadcast. The careful synchronization required between locations would be severely complicated by tape delays. Additionally, it would be necessary to monitor all feeds on a tape delay, not just the one actually being broadcast at a given time, because the need to quickly switch to a different feed requires that the other feed also be "clean" at all times. Although it may be technically possible to achieve a tape-delayed, expletive-free broadcast in these special situations, the costs involved may seriously discourage broadcasters from continuing with such programming. If the costs prove too high, certain live programming will become economically infeasible.

Even if tape delays *could* be used in many live broadcasts, viewers often desire that "live" broadcasts be precisely that, not on a tape delay. For example, Tennessee Titans fans attending a game in 2006 were upset when a radio broadcast of the game lagged the action on the field by twelve sec-

onds—a delay that had been imposed by Citadel Broadcasting out of concern for compliance with the FCC regulations. *See* Mike Organ, *Titans fans rip radio delay of game: Fear of fine forces 12-second holdup*, Tennesean, Aug. 16, 2006, at 1C. Longer tape delays likewise result in viewer dissatisfaction.[6] Indeed, the FCC has previously recognized, for other purposes, that the demands of providing live sports coverage require special regulatory consideration. *See* 47 C.F.R. § 76.95(b) (2008) (excepting time immediately following live sports broadcast from non-duplication protection). Similar recognition is lacking from the sanction authority claimed here.

The threat of crippling fines under the fleeting expletives policy thus will induce broadcast stations to ratchet up tape delays or err on the side of abandoning live broadcasts altogether. The loss of such significant programming would seriously undermine First Amendment values.

IV. ADVANCES IN FILTERING TECHNOLOGIES ELIMINATE ANY NEED TO EXPAND THE FCC'S AUTHORITY BEYOND THE NARROW LIMITS SET FORTH IN *PACIFICA*

For the reasons explained above in Parts I and II, the FCC's current fleeting expletives policy is inconsistent with *Pacifica* itself, for *Pacifica* involved expletives that were neither fleeting nor subject to arbitrary and selective discretion. Nor did *Pacifica* consider clear evidence of self-censorship like that described above in Parts II and III. Thus even under *Pacifica*, avoidance of serious First Amendment questions

[6] *See, e.g.*, Mark Starr, *Can Sasha Cohen Save the Olympics?*, Newsweek, Feb. 22, 2006, http://www.newsweek.com/id/57126 ("You don't like to see events on tape delay because if you are a real fan, it's hard to maintain your ignorance of the results."); Joachim Vosgerau et al., *Indeterminacy and live television*, 32 J. Consumer Research 487 (2006) (concluding that indeterminacy of live broadcasts results in consumer preference for live television over tape-delayed broadcasts).

counsels affirmance here. Should the Court consider reversal, however, necessarily expanding the permissible range of FCC authority beyond *Pacifica*'s scope, intervening technological changes would counsel against it.

The last thirty years have seen rapid development and proliferation of new media technologies. This Court has repeatedly affirmed that communications over these new media—in particular, cable television and the Internet—deserve full First Amendment protection from government censorship.[7] The Court has further recognized that less restrictive "opt-out" alternatives limiting the exposure of children to indecent speech on the back end are preferable to governmental restrictions imposed up front. These considerations make any expansion of *Pacifica* inappropriate.

A. Cable Television And The Internet Illustrate The Feasibility Of "Opt-Out" Technologies

This Court has consistently held that less restrictive alternatives empowering individuals to opt out from receiving unwanted speech are preferable to government censorship of speech in advance.[8] Opt-out has also been the norm for cable

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[7] In *United States v. Playboy Entertainment Corp.*, this Court held that, for "a content-based regulation" of cable television, "[t]he standard [of review] is strict scrutiny." 529 U.S. 803, 814 (2000). Likewise, in *Reno v. ACLU*, this Court noted that, because the "purpose" of the challenged regulation of internet speech was "to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," the regulation was "a content-based blanket restriction on speech" warranting "application of the most stringent review." 521 U.S. 844, 868 (1997); *accord*, *Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004).

[8] *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (recipients of unwanted speech may "effectively avoid further bombardment of their sensibilities simply by averting their eyes") (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)); *see also Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the avail-

television and the Internet: rather than permitting government censorship, this Court has looked to less restrictive technological alternatives through which parents could use self-help to block offending speech from the home.

In *United States v. Playboy Entertainment Corp.*, this Court recognized that content-based restrictions on speech over cable television are unsustainable when "[c]able systems have the capacity to block unwanted channels on a household-by-household basis." 529 U.S. 803, 815 (2000). "The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem." *Id.* (internal cross-references omitted). Instead, the ability of parents to engage in "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place for receipt." *Id.*

Likewise, in *Reno v. ACLU*, the Court pointed to user-based content-filtering software that would "soon be widely available" as a preferred alternative to government censorship of the Internet under the Communications Decency Act of 1996. 521 U.S. 844, 877 (1997). The Court reaffirmed its preference for opt-out filters in *Ashcroft v. ACLU*, upholding a lower court's grant of a preliminary injunction against the Child Online Protection Act (COPA) because "[f]ilters are less restrictive" than COPA, as "[t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source." 542 U.S. 656, 667 (2004).

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ability of less intrusive and more effective measures to protect privacy" than a flat ban on such signs.); *accord*, *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 168-69 (2002).

Although filtering capabilities were limited at the time of *Reno*, filtering software has greatly improved over the last decade. *See Updated Web Content Filtering Software Comparison*, conducted by eTestingLabs under contract from the U.S. Department of Justice, October 2001, *available at* http://www.surfonthesafeside.com/aboutcic/usdoj.pdf. In 2004, this Court recognized the improved effectiveness of filtering software, noting that "[f]ilters also may well be more effective than [the restrictions imposed by] COPA." *Ashcroft*, 542 U.S. at 667. Subsequent testing has confirmed that filtering software has become "better at blocking pornography," such that "[a]ll of the products tested" in a 2005 market study "were very good or excellent at blocking pornography," although some could be "heavy-handed" in blocking non-obscene material. *Filtering Software: Better, but still fallible*, Consumer Reports, June 2005, at 36.

These improvements in Internet filtering technology responded to the growth in parents' demand for filtering software. By 2005, fifty-four percent of Internet-connected families with teens—a total of twelve million users—used filtering software, a sixty-five percent increase from the total filter use in December 2000. Amy Lenhart, Pew Internet & American Life Project, *Protecting Teens Online* at i, 7-8 (2005), *available at* http://www.pewinternet.org/pdfs/pip_filters_report.pdf. This rapid adoption has effectively validated this Court's preference for market-based options for parental control over government censorship.

B. Filtering Options Are Also Increasingly Effective For Television Broadcasts

The "V-Chip" presents a similar opt-out alternative by which technology can enable parental control and limit broadcast speech in the home without sacrificing the First Amendment rights of speakers and willing audience members. In 1999 and 2000, the FCC implemented "rules requiring all television sets with picture screens 33 centimeters (13

inches) or larger to be equipped with features to block the display of television programming based upon its rating." FCC, *V-Chip: Viewing Television Responsibly*, http://www.fcc.gov/vchip. This device, commonly known as the V-Chip, "reads information encoded in the rated program and blocks programs from the set based upon the rating selected by the parent." *Id.* [9]

Parents who have used the V-Chip have found the technology to be useful for guiding their children's television choices. In a 2004 survey, sixty-one percent of parents who had ever used the V-Chip found it to be "very useful" and another twenty-eight percent of parents found to the technology to be "useful."[10] Reflecting growing awareness of V-Chip technology, the survey showed that by 2004, fifteen percent of parents had used the V-Chip, up from seven percent in 2001. *Id.* A 2007 study found two-thirds of parents reporting that they "closely" monitor their children's media use, and found that that use of the V-Chip has grown to six-

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[9] At present, the V-Chip implements a rating system known as the "TV Parental Guidelines" that the entertainment industries developed after Congress "gave the broadcasting industry the first opportunity to establish voluntary ratings" in § 551 of the Telecommunications Act of 1996. The guidelines provide age-based ratings similar to those used by the Motion Picture Association of America –TV-Y ("All children"), TV-Y7 ("Directed to Older Children), TV-G ("General Audience"), TV PG ("Parental Guidance Suggested"), TV-14 ("Parents Strongly Cautioned"), and TV-MA ("Mature Audience Only"). In addition, the guidelines provide for content-based indications for violence (V), sexual situations (S), crude, indecent, or coarse language (L), and suggestive dialogue (D). *Id.* Shows qualify for TV-14 or TV-MA ratings only if at least one content indications is applicable; TV-PG shows may carry content ratings if applicable.

[10] Kaiser Family Found., *Parents, Media and Public Policy* 7 (2004), *available at* http://www.kff.org/entmedia/7156.cfm

teen percent and significantly, nearly three out of four parents who had tried the V-Chip said they found it "very" useful.[11]

This positive response to the V-Chip from parents who have used it "would indicate that increased knowledge of the V-chip would substantially increase parents' perceptions of control over their children's television viewing." Patricia Moloney Figliola, Cong. Research Serv., *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming*, at 8 (updated May 2, 2005), *available at* http://lieberman.enate.gov/ocuments/crs/vchipchildren.pdf. Parental awareness and use of the V-Chip may be increased by advertising, through "public service announcements on television, educational materials on the FCC website, and possibly public service advertisements in the print media." *Id.* at 9.

V-Chip penetration into the market will naturally increase for two reasons: First, all televisions larger than 13 inches built after 2000 must have a V-Chip. *See* FCC, *V-Chip: Viewing Television Responsibly*, http://www.fcc.gov/vchip. Second, because of the switch to all-digital broadcasts in 2009, owners of analog televisions will either have to replace their sets with new ones containing V-Chips or acquire digital-to-analog converter boxes, which, under FCC rules, must include V-Chip technology. *See Rules to Implement a Coupon Program for Digital to Analog Converter Boxes*, 72 Fed. Reg. 12097, 12106 & n.113 (March 15, 2007); *see also* Melissa J. Perenson, *CES Preview: TV Converter Boxes Offer Escape From Analog TV*, PC World, January 2, 2008, http://www.pcworld.com/article/140751/es_preview_tv_converter_boxes_offer_escape_from_analog_tv.html.

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[11] *See* Kaiser Family Found., *Parents Say They're Getting Control of Their Children's Exposure to Sex and Violence in the Media*, *available at* http://www.kff.org/entmedia/entmedia061907nr.cfm; Kaiser Family Found., Parents, *Media and Public Policy* 7 (2007), *available at* http://www.kff.org/entmedia/7638.cfm.

And the switch to digital broadcasting will open up opportunities for further improvement of the V-Chip. The original V-Chip could read only the TV Parental Guidelines and the MPAA ratings. Since 2006, however, the FCC has implemented rules that require digital television receivers to contain an "open V-Chip" that will be able to "respond to changes in the content advisory system" imposed on broadcasters, and will thus adjust to and reflect any future changes to the ratings system. *See* 47 C.F.R. § 15.120(d)(2) (2007); Bary Alyssa Johnson & Mark Hachman, *'V-Chip 2.0' Turns On In March*, PCMag.com, Feb. 3, 2006, http://www.pcmag.com/article2/0,1895,1930598,00.asp. More accurate ratings of programs and adoption of improved rating systems then would be feasible. Such ratings would, via the V-Chip, facilitate parental blockage of shows that contain or are likely to contain fleeting expletives.[12]

The V-Chip thus presents a developing alternative for parents to opt out from and to protect their children from receiving unwanted speech. The widespread adoption of content filtering on the Internet and the improvement of content-filtering technology in the years between *Reno* and *Ashcroft* offers a useful comparison. By declining to sanction government censorship of the Internet, this Court encouraged the market for opt-out alternatives for parents who wished to limit their children's access to harmful Internet speech. By

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[12] At any rate, there is evidence that the current ratings system is helping parents control their children's viewing choices. Not only do parents who use the V-Chip find it useful, but 88% of parents found the ratings systems by themselves to be "somewhat useful" or "very useful." Kaiser Family Found., *supra*, at 5. And even the evidence marshaled by the FCC states that there is "solid support for the conclusion that, in general, the age-based ratings are being applied in a way that reasonably reflects the content of those shows," and that "[o]n the whole, the industry's performance at applying the age-based rating system appears highly credible." Dale Kunkel et al., *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. Comm. 112, 127 (2002).

declining to expand the FCC's special power to censor broadcasting beyond *Pacifica*, the Court would again encourage the market for and development of the V-Chip. Such a flexible alternative would facilitate parents' control over their children's television viewing even as the marketplace of speech runs its natural course between speakers and willing viewers and listeners, just as the First Amendment contemplates.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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